

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 15 1996

In the Matter of

AMENDMENT OF PART 20 AND 24 OF THE
COMMISSION'S RULES -- BROADBAND
PCS COMPETITIVE BIDDING AND THE
COMMERCIAL MOBILE RADIO SERVICE
SPECTRUM CAP

WT Docket No. 96-59

AMENDMENT OF THE COMMISSION'S
CELLULAR PCS CROSS-OWNERSHIP RULE

GN Docket No. 90-314

To: The Commission

COMMENTS OF LIBERTY CELLULAR, INC.

Liberty Cellular, Inc. ("Liberty"), by its attorneys and pursuant to FCC Rule Section 1.415, respectfully submits these Comments in response to a Notice of Proposed Rule Making released by the Commission on March 20, 1996 (FCC 96-119) (hereafter the "NPRM"). Through these comments, Liberty requests the Commission to maintain and expand opportunities for small businesses and consortia of small businesses in the forthcoming auction(s) of 10 MHz PCS licenses.

Introduction

1. Liberty is a Kansas corporation headquartered in Salina, Kansas. Liberty is owned by twenty-five local exchange carriers, directly or through affiliates, who participate in regional ownership of cellular radio facilities, common carrier point-to-point microwave radio service facilities, and a fiber

optic network, as well as related, supporting facilities. All of Liberty's cellular facilities are in Kansas Rural Service Areas.

2. The upcoming PCS auction(s) provide a unique opportunity to acquire spectrum rights useful to supplement cellular capacity. Even where capacity is not currently a problem, PCS is useful to a rural area cellular licensee as a means to offer new and expanded calling features available through digital technology, without disruption to existing customers who own analog cellular equipment. In these comments Liberty will suggest rules and rule changes that will assist the Commission to craft a balance in the interests of future auction participants.

**The Affiliation Rules Should Be Modified
Along With Simplification of Application
Ownership Information Disclosure Requirements**

3. The NPRM reviewed current rule requirements for disclosure of applicant ownership in the initial Form 175 application. With the experience of two PCS auctions, the Commission appropriately invites comments on whether some simplification in the disclosures are appropriate for the next auction(s).

4. Review of many of the Form 175 applications filed for the C-Block auction shows that much time and effort was expended by prospective licensees to develop information for the exhibits. The Commission's rules require details which appear irrelevant to

licensing qualifications, and are especially burdensome at the pre-auction stage. For example, lists of an applicant's subsidiaries and affiliates often contain information of no apparent benefit to the Commission or to other applicants. If the Commission is concerned about interests in other bidders for the same auction, a more focused disclosure requirement could be substituted for the general disclosure requirement in the rules. Likewise, the need for disclosure of ownership information that extends to details of family trusts appears to be a burdensome requirement at the pre-auction stage. A less burdensome disclosure requirement might be to require identification by name, address and citizenship of those persons with an effective 5 percent or greater voting interest in an applicant, and of those who hold an effective 10 percent or greater non-voting interest. The "principal business" of owners appears to be another unnecessary detail that could be eliminated in the auction applications.

5. Affiliation is a term with multiple connotations under the disclosure and eligibility rules. The term has significance with regard to which persons and entities must be identified in the application, and the term has meaning insofar as gross revenues of an applicant's affiliates must be counted in a determination of an applicant's qualifications for license and benefits eligibility. After review of a four-page single-spaced definition of the term in Section 24.720(1) of the rules, questions remain as to whether all

aspects of the definition remain relevant to the Commission's appropriate licensing concerns.

6. A portion of the definition of affiliate describes "affiliation through common management" and states that

[a]ffiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity. [Section 24.720(1)(7)]

As applied to a practical situation, Liberty's various officers and directors are also involved in the management of their respective rural telephone companies.^{1/} The apparent meaning of the rule is that the rural telephone companies managed by Liberty's officers and directors are "affiliates" of Liberty, even though such officers and directors are not involved in the day-to-day management of Liberty and are not authorized to "control" Liberty under the myriad forms of control recognized by the Commission. If that interpretation is correct, then the gross revenues of such telephone companies and their affiliates are attributable to Liberty in a calculation to determine Liberty's eligibility for certain licenses and auction benefits. Liberty has not yet determined the effects of such calculations upon its future qualifications, but it requests at this time that the Commission review the meaning of the "affiliation through common management"

^{1/} No owner of Liberty's stock holds as much as a 5 percent interest in Liberty. There is no sharing of facilities between Liberty's stockholders and Liberty that would result in a finding of affiliation under Section 24.720(1)(8) of the rules.

term, and consider whether any purpose is served by requiring a calculation of revenues where there is. in this instance, no actual common control between the rural telephone company stockholders and Liberty.

**Eligibility for F-Block PCS Licenses Should be
Limited to Qualified Small Business Entities**

7. Congress conferred auction authority upon the Commission with concerns about the opportunities of "Designated Entities" or "DEs" to "...participate in the provision of spectrum-based services" such as broadband PCS.^{2/} The Commission was directed to consider the use of tax certificates, bidding preferences, and other procedures to accomplish a Congressional intention to foster DE ownership of new telecommunications facilities.

8. Congress did not originate the plan for DE benefits with an understanding that DEs would be relegated to trophy positions in C-Block applicants. The most successful of such applicants were created as new business ventures with financing from multinational companies. The practical effect is that most DEs have been excluded from PCS facilities ownership because they were not chosen by large companies as DEs "friendly" to large company interests. Trade press reports offer daily insights into how C-Block applicants are beholden to their large company venture partners for

^{2/} See, Section 309(j)(4)(D) of the Communications Act.

not only financing but also equipment and a variety of other services.

9. In fashioning the C-block rules the Commission allowed large companies to own major interests in C-Block applicants to provide access to capital to construct systems and compete with other wireless services providers.^{3/} Whether or not large companies were needed to support C-Block DEs, the same reasoning should not pervade the F-Block eligibility rules. What remains of the broadband PCS licenses, after 90 MHz of spectrum has been licensed in three 30 MHz blocks, are three separate 10 MHz licenses for the 493 Basic Trading Areas ("BTAs").^{4/} Head-to-head competition for the same commercial market is not likely between a 10 MHz licensee which holds no other Commercial Mobile Radio Services spectrum and established cellular or 30 MHz PCS licensees. The Commission itself has distinguished 10 MHz from 30 MHz PCS in the adoption of different "build-out" requirements for these licenses.^{5/}

^{3/} See, for example, the Fifth Report and Order in PP Docket No. 93-253, released July 15, 1994, at paras. 10-11.

^{4/} The BTAs are the smallest areas made available by the FCC for PCS licensing purposes. One approach to making available more opportunities to DEs would be to allow F-Block licenses to be auctioned for smaller geographic areas, such as counties, if interested parties file an expression of interest by a certain date in a portion of a BTA.

^{5/} A 30 MHz PCS licensee is obligated to serve with a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within 5 years,
(continued...)

10. Liberty respectfully urges the Commission to limit the eligibility for F-Block licenses to small businesses, including qualifying rural telephone companies, women, members of minority groups and consortia of small businesses. All C-Block winners who do not meet the DE definitions will be eligible for the D and E-Blocks where the Commission may provide preferential opportunities for all such companies meeting the Entrepreneurs' Blocks financial caps. Only if the F-Block is reserved for DEs will DEs have the opportunities Congress intended when auction authority was granted to the Commission.

**F-Block Auction Benefits For DEs Should Be
No Less Than Benefits Made Available In The C-Block Auction**

11. The NPRM invited comments on whether benefits made available to C-Block auction winners should be offered in lesser degrees to F-Block auction winners. Liberty submits that the continuance of discounted upfront payments, bidding credits and installment payments, on terms no less favorable than those offered to C-Block winners, are appropriate and best assure the realization of Congress' purpose in recognition of DE needs in the auction process.

^{5/} (...continued)

and two-thirds of the population in their licensed area within 10 years of being licensed. Compare the substantially lesser burden placed upon 10 MHz PCS licensees who need only to provide a sufficient signal level to at least one-quarter of the population in their licensed area within 5 years, with no further construction requirement. See, Sections 24.203(a) and (b) of the Commission's rules.

12. Liberty understands that upfront payments serve the Commission's purpose of screening insincere and incapable applicants from the auction. However, the Commission's purpose in this regard is at odds with the interests of applicants which have other opportunities and needs for investment of capital during the pendency of the auction. If the U.S. Treasury paid interest on deposited funds, the imposition upon bidders would be lessened. In any case, the burden upon DEs of lost use of capital is significant, and the Commission, for the F-Block auction, should not lessen the discount in upfront payments that was offered to C-Block applicants. Likewise, bidding credits and installment payment terms should not be changed for the F-Block auction. Small businesses and other DEs need the benefits not only to pay for the licenses, but to avoid inequities through the terms offered to C-Block and F-Block auction winners.

Conclusion

13. Auctions of PCS spectrum to date provide useful insights for the upcoming auction(s) of 10 MHz licenses. The Commission appropriately seeks input on how the next PCS auction can better meet all objectives, not just financial goals, with a minimum of wasted effort by applicants and the Commission's staff.

14. The information required in Form 175 application exhibits for past auctions was unnecessarily detailed and burdensome in some respects. Review of those requirements and elimination of

irrelevant detail at the pre-auction stage is a task that will benefit all participants.

15. Likewise, an overly broad definition of the term "affiliation" in the context of "affiliation through common management" could have the effect of denying auction benefits where there is, in fact, no common control between companies. The Commission should review Section 24.720(1)(7) of the rules, and limit its applicability to situations where there is common control through common management.


16. To better achieve Congressional objectives for Designated Entities, the eligibility for F-Block licenses should be limited to small businesses and consortia of small businesses. Most DEs would have a reasonable opportunity to compete for licenses under such an eligibility limitation. Otherwise, if C-Block eligibility rules remain in place for the F-Block, the largest multinational companies will finance, and indirectly control, applicants for the F-Block auction. There is more than ample basis to distinguish the F-Block from the C-Block in the needs of auction winners for operating capital, and C-Block winners can be afforded benefits in the D-Block and E-Block auction if the Commission concludes that benefits are appropriate.

17. As the Commission reviews Designated Entity benefits available auction winners, it should not diminish the benefits of

of discounted upfront payments, bidding credits or installment payments for F-Block winners. Small businesses in particular need use of their capital for as long as possible and should not be disadvantaged relative to the C-Block winners which in many cases could rely upon large company investors for financing needs.

Respectfully submitted,

LIBERTY CELLULAR, INC.

By: 
David L. Nace

Its Attorney

Lukas, McGowan, Nace & Gutierrez, Chartered
1111 19th Street, N.W. 12th Floor
Washington, D.C. 20036
(202) 857-3500

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CERTIFICATE OF SERVICE

I, Loren Costantino, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify that I have, on this 15th day of April, 1996, had a copy of the foregoing Comments of Liberty Cellular, Inc. hand-delivered to the following:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, NW, Room 802
Washington, DC 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, NW, Room 844
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, NW, Room 832
Washington, DC 20554

Rosalind K. Allen
Associate Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, DC 20554

David Furth, Acting Chief
Commercial Wireless Division
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, DC 20554

Michelle Farquhar, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N. W., Room 5002
Washington, D. C. 20554


Loren Costantino